SUPPORTING BRIEF.

OPINIONS BELOW.

The District Court did not render an opinion, but entered its Findings of Facts, Conclusions of Law and Directions for Judgments (R. 573-593), and its Amended and Additional Findings of Fact (R. 611-619).

The opinion of the Circuit Court of Appeals (R. 1128-1161) is reported as *Becker, Collector of Internal Revenue, v. Anheuser-Busch, Inc.*, 120 F. (2d) 403.

JURISDICTION OF THIS COURT.

The judgment of the Circuit Court of Appeals was entered on May 29, 1941 (R. 1161). A petition for rehearing (R. 1169), filed on June 13, 1841, was entertained by said court and denied on June 23, 1941 (R. 1183). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347).

STATEMENT.

A full statement of the case has been made in the foregoing petition for writ of certiorari, to which reference is hereby made.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in holding that under the facts and circumstances of this case deductions in the taxable years for obsolescence of the Bevo cases and bottles in controversy, were not authorized by Section 234 (a) 7 of the Revenue Act of 1924.

2. The Circuit Court of Appeals erred in disregarding and in failing to consider and give effect to the essential facts of record in the case, as determined by the District

Court, concerning the efforts of Anheuser-Busch, Incorporated, in 1921, 1922 and 1923, to utilize the Bevo cases and bottles in controversy through the marketing of new products then being developed, by reason of which the accrual of obsolescence was retarded until the advent of the taxable years, when such new products became demonstrated failures, and the equipment retained, until such time, the character of equipment usable in the business.

3. The Circuit Court of Appeals erred in holding that the loss of usefulness of the equipment here in controversy was not functional and did not arise from external causes.

4. The Circuit Court of Appeals erred in disregarding and in failing to consider and give effect to the facts of record in this case, as determined by the District Court, showing that the primary cause of the loss of usefulness of the equipment was the introduction of de-alcoholized near-beer under changed governmental regulations—a wholly external cause not within the control of the taxpayers.

5. The Circuit Court of Appeals erred in holding that Section 234 (a) 7 of the Revenue Act of 1924, authorized only annual deductions, similar to depreciation deductions, over a period of years measuring the useful life of an asset.

6. The Circuit Court of Appeals erred in considering abandonment or discarding of an asset as a prerequisite to an obsolescence deduction.

7. The Circuit Court of Appeals erred in holding that under the facts and circumstances of this case deductions in the taxable years for loss of useful value of the Bevo cases and bottles in controversy were not authorized by Section 234 (a) 4 of the Revenue Act of 1924.

8. The Circuit Court of Appeals erred in disregarding and in failing to consider and give effect to the facts of record in this case, as determined by the District Court, that

the equipment in controversy was being held in prior years for the marketing of new products then being developed, by reason of which the termination of its usefulness was postponed until the taxable years when such products were demonstrated failures.

9. The Circuit Court of Appeals erred in holding that abandonment or discarding of an asset [within the meaning of the regulations under Section 234 (a) 4 of the Revenue Act of 1924, relating to loss of useful value] implied relinquishment of ownership and possession through sale or destruction, and in failing to hold that under the facts and circumstances of this case the equipment in controversy was abandoned when charged off in the taxable years.

10. The Circuit Court of Appeals erred in failing to hold that petitioners were entitled to deductions on account of obsolescence or loss of useful value of the Bevo cases and bottles in controversy, as determined by the District Court.

11. The Circuit Court of Appeals erred in failing to hold that petitioners were entitled to judgments for overpayments of income taxes for the years 1924, 1925 and 1926 in the aggregate amount of $123,179.46, in accordance with the computations adopted by the District Court and in the respective amounts for which the District Court entered judgments.

12. The Circuit Court of Appeals erred in failing to hold that if the District Court erred in holding that Anheuser-Busch, Incorporated (1875), and Anheuser-Busch, Incorporated (1925), were the same taxpayer within the meaning of Section 206 (b) of the Revenue Act of 1924, petitioners were entitled to enhanced judgments in the aggregate amount of $145,802.65, computed upon the theory that said two corporations were separate taxpayers.

ARGUMENT.

Point I.

The Circuit Court of Appeals, in Holding That Petitioners Were Not Entitled to Deductions for Obsolescence Under Section 234 (a) (7) of the Revenue Act of 1924, Completely Failed in Its Opinion to Consider or Advert to the Essential Facts, as Determined by the District Court Concerning the Efforts of Anheuser-Busch, Incorporated, in 1921, 1922 and 1923 to Utilize the Bevo Cases and Bottles in Controversy Through the Marketing of New Products Then Being Developed.

In 1919, the brewing industry underwent drastic changes. Bevo, developed at a time when governmental regulations necessitated the production of nonalcoholic cereal beverages by an "arrested fermentation" process and their marketing in containers radically different from beer bottles (R. 577-578), was driven from the market by the production and sale in large quantities of the more palatable near-beer manufactured by the "de-alcoholizing" process and marketed in beer bottles, under changed regulations so permitting (R. 578). Consequently, from 1918 to 1919 the annual sales of Bevo dropped from 10,449,152 dozen bottles to 3,904,316 dozen bottles. By 1921 the sales were reduced to 794,378 dozen bottles (R. 620).

At approximately the same time that Bevo suffered its decline, production and sale of alcoholic beer ceased as a result of National Prohibition.

These facts, pertinent to ascertainment of the *cause* of the obsolescence or loss of useful value of the Bevo cases and bottles in controversy, will be further considered under Point II. The allocation of the *resultant loss* to the tax years was justified by the further record facts,

now to be referred to, which were not considered by the Circuit Court of Appeals.

As a result of the changes referred to, Anheuser-Busch, Incorporated, deprived of its principal product, was confronted with the alternatives of going out of business or of finding new means to utilize its plant, and to utilize, incidentally, the 749,897 Bevo cases and 3,680,231 dozen Bevo bottles here in controversy which had, by the end of 1921, accumulated in storage as a result of returns of equipment by the trade in excess of shipments to the trade (R. 579).

It chose the alternative of staying in business and undertook to utilize its case and bottle supplies through the introduction of new products, Ginger Ale, grape drinks and chocolate drinks (R. 579). Its expenditure of the funds required for the development of those products itself attests the good faith of the management in believing that the products would be successful and that such success would result in the utilization of the equipment. Had it succeeded in this in a measure commensurate with its success with Bevo, or in a measure commensurate with the success of other companies with similar products (e. g. Ginger Ale), there would have been no loss on this equipment.

The theory upon which the petitioners presented this case was that the equipment could not have been written off as useless at a time when the company, with reasonable expectation of success, planned to use it in the marketing of the new products; that the company was entitled to a reasonable opportunity to ascertain whether in fact the equipment had or did not have further usefulness before it was required to consider charging it off on account of obsolescence or loss of useful value; that allocation of the losses to the years when the Bevo cases and bottles had

accumulated would amount to penalizing the company for its courage in attempting to find profitable use for the property, and for the error of its belief that it could find such use; and that the years to which the losses were properly allocable were those in which the efforts to avert loss became demonstrable failures.

The Circuit Court of Appeals treated this case as if the facts touching upon the efforts of the company to stay alive and to utilize the equipment were not in the case. By treating the case as if it presented a state of facts, under which, subsequent to the drastic supersession of Bevo, the company had done nothing which affected the status of the Bevo case and bottle equipment, the Circuit Court of Appeals enabled itself to reach a conclusion with respect to the equipment that its "usefulness had terminated long before" the tax years (R. 1160, 1152).

It also enabled itself thereby to reach the conclusion (R. 1152; 120 F. [2d] 414) that the property was not used in the trade or business in the taxable year. Although neither the statute nor the regulation relating to obsolescence make any requirement of use during the taxable year, the continued reservation of the property for probable use for the new products until the taxable years, spells all that can possibly be required.

A day in court has not been granted without the consideration of the case as presented by the petitioners.

What petitioners sought in the courts was a determination whether, **under the facts and upon the figures presented,** reasonable business men would have concluded in 1924, and in 1925, that the efforts of the company to avert loss had failed, and that the cases and bottles in controversy could never be used again, and could not be sold excepting as junk.

The conclusion of the District Court as to the reasonableness of the write-offs was based upon facts and figures showing that in 1924, after three years experience in the marketing of the new products, the total volume of sales of all products moving in Bevo bottles did not exceed one-eighth of the peak volume of Bevo sales in 1918 (R. 580).

That conclusion was presented to the Circuit Court of Appeals for review, but was not reviewed.

Point II.

The Circuit Court of Appeals Disregarded the Facts of Record in This Case Relative to the Cause of the Loss of Usefulness of the Equipment.

The District Court in its findings of facts clearly defined the chain of events which led to the accumulation in storage of the equipment here in controversy. Bevo was manufactured by the "arrested fermentation process" in conformity with regulations in force at the time of its development (R. 575-576). Changed governmental regulations permitted the introduction of nonalcoholic cereal beverages manufactured by the "de-alcoholizing process" (R. 578-24). The introduction and competition of such new products, because of their greater palatability, caused a drastic decline in sales of Bevo (R. 578-23, 24). Such decline in sales implied an excess of returns from the trade of Bevo cases and bottles over shipments to the trade and caused the accumulation of equipment in storage (R. 579-28). By the end of 1921 the decline was recognized as permanent (R. 616-IX).

That the supersession of Bevo was the operating *cause* of the loss is clear. The fact that in the years 1920 to 1923 the accumulated equipment was held for use in the marketing of other beverages then being developed (R. 579-29) merely postponed the *effect*, i. e., retarded the

accrual of the obsolescence, until failure of those other products became demonstrable. At that time the equipment was neither usable nor salable (R. 580-34, 582-51, 583-52).

The Circuit Court of Appeals in holding [R. 1156; 120 F. (2d), at 416] that the losses here in question were not of a functional nature and did not arise from external causes so as to fall within the definition of obsolescence as contained in *Real Estate Land Title and Trust Company v. United States*, 309 U. S. 13, reached a conclusion which was not only contrary to the findings of the District Court, but was wholly unsupported by any evidence in the case.

In the *Real Estate Land Title and Trust Company* case this court had before it a situation involving no change in economic conditions, but merely a voluntary consolidation of title companies, which created a duplication of title plants.

In the instant case Anheuser-Busch, Incorporated, was the victim of drastic changes in the industry in which it was engaged. The supersession of its product, Bevo, was in no sense brought about by its own choice. The causes for that supersession were wholly external to it, and they resulted in a functional uselessness of the property.

Point III.

The Circuit Court of Appeals in Holding That Section 234 (a) (7) of the Revenue Act of 1924 Authorized Only Annual Deductions, Similar to Depreciation Deductions, Over a Period of Years Measuring the Useful Life of an Asset, Rendered a Decision in Conflict With the Decisions of This Court.

The Circuit Court of Appeals treated Section 234 (a) (7) as authorizing deductions for obsolescence only where, on

the basis of an estimate of normal useful life, the allowances could be spread over the period of that life (R. 1148, 1152; 120 F. [2d] at 412, 414)—although the Treasury Department has for years recognized that "obsolescence" does not have such limited meaning. In Bureau Bulletin "F," January, 1931 (C. C. H. Federal Tax Service 1941, p. 1791), it was said:

> "Two principal forms of obsolescence are generally recognized: The first, a sudden loss of useful value brought about by some radical change, and the second, a more gradual reduction of usefulness due to the accumulated effect of small improvements or changes introduced from time to time in the art or industry generally, no one of which improvements or changes in itself is sufficient to result in complete loss of usefulness of the particular property.
>
> "*Obsolescence of the first type rarely can be predicted prior to its occurrence.* However, this does not necessarily imply that the asset already must have been completely discarded or become useless, but merely that a point has been reached where it can be predicted with reasonable accuracy that its continued use beyond a certain future date, prior to the end of its normal useful life, will be impossible or unprofitable."

The decisions of this court have recognized that the accrual of obsolescence may frequently not be capable of anticipation, and that, where such is the case, the deductions are allowable when the loss becomes apparent.

In *United States Cartridge Company v. United States*, 284 U. S. 511, an ammunition plant was held to have become obsolete at the moment when war ended. In *Gambrinus Brewery Company v. Anderson*, 282 U. S. 638, *Burnet v. National Industrial Alcohol Company, Inc.*, 282 U. S. 646, and *Burnet v. Niagara Falls Brewing Company*, 282 U. S. 648, this court held permissible the taking of obso-

lescence on brewery properties and alcohol plants over the comparatively short period from January 31, 1918, when it became known that Prohibition would become effective, to January 16, 1920, when Prohibition did become effective.

Obsolescence is not capable of admeasurement by the foot rule, time clock or comptometer. In the words of this court in the *Niagara Falls Brewing Company* case (282 U. S., at 655) "such weight of evidence as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money fairly may be deemed sufficient." In cases involving factors such as obsolescence and depletion, it has been said that it is better to act upon rough estimates than to ignore the fact that the phenomena had occurred. *United States v. Ludey*, 274 U. S. 295; *Helvering v. Taylor*, 293 U. S. 507.

By taking the narrow, and, we submit, erroneous, view of obsolescence as something capable of being anticipated and measured in terms of annual allowances, and by rejecting the concept of obsolescence as one which yields to the facts of the particular case, as in the cases above cited, the Circuit Court of Appeals announced a rule so strict as in effect to nullify the benefits of the statute. It required of the taxpayers the ability to foresee in prior years the far-reaching effects of changes in business conditions, and to take the losses before they were believed to have been incurred upon penalty of not thereafter being permitted to take them. The decision allocates losses in respect of the cases and bottles here in controversy to years prior to 1924, when men greatly experienced in the beverage business were investing good money in enterprises designed to utilize them.

The harshness of the decision goes even so far as to foreclose inquiry whether, under a consistent plan of annual allowances, portions of such allowances were not

allocable to the tax years. Wholly inconsistently the Circuit Court of Appeals ruled out the concept of accelerated obsolescence, and then held that obsolescence had been accelerated in prior years, so that the taxpayers were entitled to no allowances in the tax years.

Point IV.

The Circuit Court of Appeals in Considering Abandonment or Discarding of an Asset as a Prerequisite to an Obsolescence Deduction, Rendered a Decision in Conflict With Decisions of This Court.

Although neither Section 234 (a) (7) of the Revenue Act of 1924 nor the regulation thereunder (Regulations 65, Article 166) imposed any requirement that an asset be discarded before an obsolescence deduction may be taken in respect thereto, the Circuit Court of Appeals [R. 1150-1151; 120 F. (2d), at 413] discussed discarding as a matter bearing upon the obsolescence issue [as distinguished from the issue upon the claims of the petitioners under Section 234 (a) (4)].

In treating discarding as a prerequisite to obsolescence, the Circuit Court of Appeals decided this case upon a principle in conflict with the decisions of this court in *Gambrinus Brewery Company v. Anderson*, 282 U. S. 638; *Burnet v. National Industrial Alcohol Company, Inc.*, 282 U. S. 646; *Burnet v. Niagara Falls Brewing Company*, 282 U. S. 648, where obsolescence deductions were allowed although the taxpayers continued in the ownership of, and continued to make restricted use of, the properties written off. Similarly, in *United States Cartridge Company v. United States*, 284 U. S. 511, there was no cessation of the right of user. In each of these cases the deductions allowed were, as in the instant case, in the amount of the depreciated cost of the assets less estimated salvage value.

Point V.

The Circuit Court of Appeals in Holding That Petitioners Were Not Entitled to Deductions for Loss of Useful Value Under Section 234 (a) (4) of the Revenue Act of 1924 Disregarded the Facts of Record in This Case as Determined by the District Court Concerning the Efforts of Anheuser-Busch, Incorporated, in 1921, 1922 and 1923, to Utilize the Bevo Cases and Bottles in Controversy.

The claims for refund, upon which the instant suits were based, explicitly urged that the deductions were allowable because the equipment in controversy became obsolete and completely lost its useful value in the tax years, and specifically referred to both Section 234 (a) (7) relating to obsolescence, and Section 234 (a) (4) relating to loss of useful value (R. 302). The District Court held that the deductions were allowable under both subsections (R. 584). The Circuit Court of Appeals held that neither subsection authorized the deductions (R. 1158-1160).

In holding that usefulness of the equipment "had terminated long before" the tax years and deductions for loss of useful value in the tax years were not authorized by Section 234 (a) (4) (R. 1160; 120 F. [2d], at 417), the Circuit Court of Appeals completely disregarded the facts concerning the efforts of Anheuser-Busch, Incorporated, in 1921, 1922 and 1923 to develop new products and to utilize the equipment in the marketing of such new products, just as it disregarded such facts in relation to the claims of petitioners under Section 234 (a) (7). The contentions here are the same as those discussed under Point I, and, for sake of brevity, reargument is omitted at this point.

Point VI.

The Circuit Court of Appeals, in Holding That Abandonment or Discarding of an Asset (Within the Meaning of the Regulations Under Section 234 [a] [4] of the Revenue Act of 1924, Relating to Loss of Useful Value) Implied Relinquishment of Ownership and Possession Through Sale or Destruction, Rendered a Decision in Conflict With the Decisions of Other Circuit Courts of Appeals and Probably in Conflict With the Decisions of This Court.

The District Court found (R. 582-48) that the cases and bottles included in the write-off of 1924 were discarded and abandoned in 1924, and that the bottles which were included in the write-off of 1925 were discarded and abandoned in 1925. Such finding was in relation to the requirement of discarding contained in Article 143 of Regulations 65, relating to loss of useful value. The Circuit Court of Appeals treated such finding of the District Court as a mere conclusion and reached a contrary conclusion (R. 1150, 1159; 120 F. [2d], at 413, 417).

In rejecting the trial court's conclusion that the property in question was abandoned and discarded in the tax years, the Circuit Court of Appeals laid emphasis upon the undenied facts that "the employees were not given instructions to refrain from using the cases and bottles written off" and "there was nothing to prevent the use of the equipment at any time, *if use could be found for it.*"

While emphasizing the absence of injunction upon the employees not to use the equipment, the Court overlooked the finding of the District Court (R. 582-47) that the equipment was not accessible to the production facilities and could not be used excepting upon incurrence of expense in hauling, for which an executive order would be required.

The liberty of the company to use the equipment, *if use*

could be found for it, was indeed a hollow privilege. The company had no product to market through the use of the equipment.

The District Court's conclusion of discarding, based upon inaccessibility of the equipment (R. 582-47), *actual nonuser* after the write-offs in question (R. 582-49) and the adequacy of stocks reserved for use (R. 582-50), was overturned by the Circuit Court of Appeals on the basis of the company's retention of ownership and possession. Such basis implied that sale or destruction were prerequisites to abandonment, although Article 143 of Regulations 65 declared the rule therein expressed to be an "exception to the rule requiring a sale or other disposition of property in order to establish a loss."

Such a decision is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Wheeling Tile Co. v. Commissioner of Internal Revenue*, 25 F. (2d) 455, where a loss in respect of oil-burning equipment was allowed in the year when it failed to function satisfactorily, although it was not then disposed of; with the decision of the Circuit Court of Appeals for the Third Circuit in *Liberty Baking Co. v. Heiner*, 37 F. (2d) 703, where a loss was allowed for bread wrappers acquired for bread loaves of a size required by war regulations, although the wrappers were not destroyed; and with the decision of the Circuit Court of Appeals for the Fourth Circuit in *United States v. Hardy*, 74 F. (2d) 841, where a loss of the value of an exclusive agency for the sale of "Bevo" was allowed upon temporary cessation of the business under war regulations, although the taxpayer then retained and later sold the agency.

It was said in *United States v. S. S. White Dental Manufacturing Co.*, 274 U. S. 398, at pages 402-3:

"A loss may become complete enough for deduc-

tion without the taxpayer's establishing that there is no possibility of an eventual recoupment. * * * The Taxing Act does not require the taxpayer to be an incorrigible optimist."

The foregoing facts, authorities and argument are respectfully submitted in support of petitioners' prayer that this Honorable Court grant a writ of certiorari in the instant case.

Respectfully submitted,

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